Nos. 14-46, 14-47, 14-49

IN THE

Supreme Court of the United States

STATE OF MICHIGAN, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rules 21, 33 and 37, the Chamber of Commerce of the United States of America (the "Chamber") respectfully moves this Court for leave to submit the attached *amicus curiae* brief in support of Petitioners in Case Nos. 14-46, 14-47 and 14-49. This case involves challenges to the United States Environmental Protection Agency's National Emissions Standards for Hazardous Air Pollutants from Coal and Oil-Fired Electric Utility Steam Generating Units (referred to as the "Utility MATS Rule"), but has broad implications for industry and the nation's economy as a whole. EPA's decision that regulation of hazardous air pollutant emissions from these electric generating units under Section 112 of the Clean Air Act, 42 U.S.C. § 7412, is "appropriate" exemplifies regulatory overreach. By EPA's own admissions, this rule imposes almost $10 billion a year in costs for little to no benefit for public health. The Chamber has a significant interest in ensuring regulatory action is consistent with Congressional intent and, moreover, is reasonable.

The proceedings before the U.S. Court of Appeals for the D.C. Circuit below involved numerous petitioners and intervenors. Counsel for the Chamber provided notice to all counsel of record below ten days prior to the filing of this brief. Due to the number of parties before the lower court, however, the Chamber was not able to obtain responses from all parties prior to filing, and, thus, submits this motion for leave. Petitioners the State of Michigan, *et al.* (No. 14-46), and the Utility Air

Regulatory Group (No. 14-47) have filed blanket consent for *amicus curiae* briefs. Petitioner National Mining Association (No. 14-49) also granted consent. Counsel for the United States Environmental Protection Agency has provided written consent, which is being submitted with this motion. Respondents Calpine Corporation, Exelon Corporation, National Grid Generation LLC, and Public Service Enterprise Group, Inc. also submitted a blanket consent. In addition, counsel for the following parties have provided consent to the filing of this brief: American Public Power Association; Edgecombe Genco, LLC and Spruance Genco, LLC; FirstEnergy Generation Corp.; State and Local Governments Respondent-Intervenors; and the Public Health, Environmental and Environmental Justice Group Respondent-Intervenors. White Stallion Energy Center expressed no objection. As of the date of this filing, we have not received responses from the remaining parties before the D.C. Circuit.

INTERESTS OF *AMICUS CURIAE*

The Chamber is the world's largest business federation. It represents the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, such as this one, raising issues of vital concern to the nation's business community.

The Chamber has participated in numerous rulemakings, including the Utility MATS Rule at issue in this case. It also participated as *amicus curiae* in the proceedings below before the U.S. Court of Appeals for the District of Columbia Circuit.

The Utility MATS Rule will have a considerable impact on the Chamber's members. As one of the most expensive regulations ever for power plants, the effects of the rule will be felt by power consumers throughout the economy. Thus, the Chamber has a substantial interest in ensuring that EPA is undertaking rational rulemaking.

The Chamber submits this *amicus curiae* brief in support of petitioners, which challenge EPA's claims that its stringent and costly regulations for the power sector are "appropriate and necessary." In interpreting its authority under Section 112(n)(1)(A) of the Clean Air Act, 42 U.S.C. § 7412(n)(1)(A), EPA reversed its prior determination that costs were an appropriate consideration to finding regulation was "appropriate." In so doing, it has issued a rule that will cause a significant percentage of power plants to be shut down, which will result in job losses, electric reliability issues, and price increases for electricity and consumer goods. At the same time, the purported "benefits" of the rule derive almost exclusively from supposed coincidental reductions in fine particulate matter (PM2.5) that are in no way related to reductions in mercury or the other hazardous air pollutants Congress sought to be regulated and purportedly targeted by the regulation. Separately under the Clean Air Act, PM2.5 is regulated by EPA to reduce its presence in the atmosphere to a level sufficient to protect human health with an adequate margin of safety.

The Chamber has long promoted reasonable and common sense decision-making by agencies. In deferring to EPA here and allowing such excessive costs for little gain, the D.C. Circuit has thrown common sense out the window. The virtual

unfettered discretion allowed by the D.C. Circuit in this case requires this Court's intervention.

The Chamber believes that it can provide an additional, valuable viewpoint on the issues presented by the petitions. Specifically, the Chamber explains the broader implications of the D.C. Circuit's ruling beyond the direct effects on utilities and supplements the arguments of Petitioners.

CONCLUSION

For the foregoing reasons, the Chamber of Commerce of the United States of America respectfully requests that it be granted leave to appear as *amicus curiae* in this case and that the attached brief be submitted for filing with this Court.

August 15, 2014

Respectfully submitted,

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INTEREST OF *AMICUS*

The Chamber of Commerce of the United States of America (the "Chamber") is a nonprofit corporation and the world's largest business federation.[1] The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members own and operate electric generating units that are subject to the regulation at issue in this case (the "Utility MATS Rule"), and other members are energy consumers that will be affected by the increased costs imposed by the rule.

This case exemplifies EPA's inconsistent use of cost-benefit analyses to expand its authority and impose overly stringent requirements on industry. Here, EPA determined that regulating hazardous air pollutant emissions from electric generating units was "appropriate and necessary" under Section 112 of the Clean Air Act, 42 U.S.C. § 7412(n)(1)(A). The costs of the new regulation are staggering. The

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for the parties below received notice of *amicus curiae*'s intention to file this brief at least 10 days prior to the due date. Petitioners and Respondent EPA have consented to its filing, but the brief is being submitted on motion. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that the brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

control standards will cost the utility industry more than $9.6 billion *annually*—making this one of the most expensive regulations ever for power plants. And the economic effects are even larger and will be felt throughout the economy. Against these costs, the record reflects little-to-no public health benefit from the reduction in hazardous air pollutant emissions.

The Chamber has a substantial interest in ensuring that EPA undertakes rational rulemaking consistent with Congressional intent and its statutory authority. Under the Clean Air Act, Congress intended to focus regulation on the most serious air pollution problems. Moreover, except where prohibited by Congress, good governance requires consideration of costs to guard against irrational regulation and misallocation of resources. Certiorari is warranted here because EPA has been allowed to pick and choose when it considers costs to promote its own policy objectives, rather than the intent of Congress. The Chamber submits this brief to underscore the broader implications of the D.C. Circuit's decision and to present arguments that supplement the petitioners'.

SUMMARY OF ARGUMENT

Before EPA can regulate hazardous air pollutants (HAPs) from electric utility steam generating units (EGUs), EPA must study "the hazards to public health reasonably anticipated to occur as a result of [EGU HAP emissions] after imposition of the requirements" of the Act. 42 U.S.C. § 7412(n)(1)(A). EPA then must report the study's results and alternative control strategies to Congress. *Id.* Finally, EPA must determine whether regulation

under Section 112 is "appropriate and necessary after considering the results of the study." *Id.*

EPA's determination under this provision has changed many times. *See generally* State of Michigan, *et al.*, Pet. for Writ of Cert., No. 14-46, at 5-7 (hereinafter "State Cert. Pet."). After earlier decisions finding that EGU emissions of mercury (Hg) did not warrant Section 112 regulation, EPA in 2012 found "that Hg and non-Hg HAP emissions from U.S. EGUs pose hazards to public health," and concluded that eliminating those hazards would produce public health benefits of $4 to $6 million annually. 77 Fed. Reg. 9304, 9311, 9428 (Feb. 16, 2012). EPA further found that regulation under Section 112 was "appropriate" because of "the magnitude of Hg and non-Hg emissions, environmental effects of Hg and certain non-Hg emissions, and the availability of controls to reduce HAP emissions from EGUs." *Id.*

EPA declined to consider costs in its assessment of whether regulation of EGU HAP emissions under Section 112 was appropriate. EPA opined that it *had* to regulate HAP emissions from EGUs so long as it "identified a hazard to public health and the environment." 77 Fed. Reg. at 9327. The majority below found "no indication that Congress did *not* intend EPA to regulate EGUs if and when their public health hazards were confirmed by the study," and deferred to EPA's "permissible" construction of the statute. App. 27a-28a.[2] In dissent, Judge

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[2] Appendix citations are to the Petition Appendix filed by Petitioners in *State of Michigan, et al., v. EPA*, No. 14-46.

Kavanaugh found it "unreasonable for EPA to exclude consideration of costs in determining whether it is 'appropriate' to impose significant new regulations on electric utilities." App. 74a.

The panel majority believed its interpretation was consistent with other opinions, which it read as only *allowing* EPA to consider costs in other circumstances and as *requiring* such consideration only when expressly stated in the statute. Precedent of this Court, however, *requires* an agency use its discretion to avoid a regulation like this one, where the costs are so out of line with the purported benefits. More recent decisions also show that an agency should be guided by weighing costs and benefits, except where *prohibited*. As Judge Kavanaugh noted, "[t]hat's just common sense and sound government practice." App. 74a.

This Court's intervention is needed to draw clear lines on defining when an agency must consider costs when Congress has not expressly prohibited such consideration.

ARGUMENT

I. CERTIORARI IS WARRANTED BECAUSE THE D.C. CIRCUIT'S DECISION ALLOWS EPA TO CRAFT REGULATION BASED ON ITS OWN POLICY CHOICES RATHER THAN THOSE OF CONGRESS.

A. Review is Warranted to Resolve Inconsistencies the Panel Majority Decision Creates with Other D.C. Circuit Decisions Regarding Cost Considerations Under Other Section 112 Provisions.

Congress used the phrase "appropriate and necessary" for a reason. *See, e.g.*, State Cert. Pet. at 13-15. In addressing this nation's air pollution problems, Congress made clear that regulation under the Act generally should not be completely irrespective of costs. Congress sought to promote public welfare and this country's productive capacity. 42 U.S.C. § 7401(b)(1). A "primary goal" of the Act is to "encourage or otherwise promote *reasonable* Federal, State, and local governmental actions" for pollution prevention. *Id.* § 7401(c) (emphasis added). This Court has previously recognized that when Congress uses terms such as "appropriate" and "necessary" to guide regulatory decision-making, it contemplates consideration of economic and technological feasibility; that is, consideration of costs. *See Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 513 n.31 (1981) (noting "any standard that was not economically or technologically feasible would *a fortiori* not be 'reasonably necessary or appropriate' under [OSHA]") (citing *Industrial Union Dept. v. Hodgson*, 499 F.2d 467, 478 (D.C. Cir. 1974) ("Congress does

not appear to have intended to protect employees by putting their employers out of business.")).

The panel majority, however, erroneously held that EPA's interpretation of Section 112(n)(1)(A) as not requiring (and perhaps not allowing) consideration of costs was "consistent with the purpose of the 1990 Amendments, which were aimed at remedying 'the slow pace of EPA's regulation of HAPs.'" App. 28a (citation omitted). Congress did seek to improve regulation of HAPs generally, and standard setting for non-EGU source categories under Section 112(d) is relatively formulaic. *See generally Sierra Club v. EPA*, 353 F.3d 976, 979-80 (D.C. Cir. 2004). But that does not mean EPA can regulate under Section 112(n)(1)(A) merely for the sake of regulating. It simply does not promote public health or public welfare to impose such high costs that will permeate throughout the economy and force shut downs and job losses, while providing little benefit with respect to *HAP emissions*.

Unlike other source categories, Section 112(n)(1)(A) directs EPA to determine whether it is "appropriate and necessary" to regulate EGUs under Section 112. Section 112 includes provisions to give EPA flexibility to avoid highly inefficient regulation and egregiously unnecessary costs. The panel majority, nonetheless, declined to read "appropriate" to include consideration of costs, noting Congress did not expressly reference costs in Section 112(n)(1)(A) as it had elsewhere in Section 112. App. 26a. But, EPA has considered costs under other provisions of Section 112 even though Congress did not expressly reference costs in those provisions. *See Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 673-74

(D.C. Cir. 2013) (affirming consideration of costs in revising emissions standards under 42 U.S.C. § 7412(d)(6)); *Natural Res. Def. Council v. EPA*, 529 F.3d 1077, 1083 (D.C. Cir. 2008) (affirming consideration of costs in setting residual risk standards to protect public health with an ample margin of safety under 42 U.S.C. § 7412(f)(2)(B)). Before the opinion below, whether costs were relevant to a Section 112 regulation did not turn simply on the mere inclusion or exclusion of the word "cost."

In *Association of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, the D.C. Circuit reviewed Section 112(d)(6)'s requirement to "review, and revise, as necessary" emissions standards under Section 112 based on developments in practices, processes and control technologies. 42 U.S.C. § 7412(d)(6). The panel agreed that Section 112(d)(6) "itself makes no reference to cost," but finding other provisions of Section 112 expressly authorizes cost consideration in other aspects of the standard-setting process, "we believe this clear statement rule is satisfied." *Ass'n of Battery Recyclers*, 716 F.3d at 673-74 (citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 467 (2001)). Where Section 112(n)(1)(A) also relates to regulation under "this section," the majority below reached the opposite conclusion. This Court should review the panel majority's holding because it creates inconsistencies with other decisions upholding EPA's consideration of costs under other Section 112 provisions.

B. Review is Warranted to Rein in EPA's Authority-Expanding, Inconsistent, and Opportunistic Approach to Cost Considerations.

As described above, EPA has inconsistently used consideration of costs in implementing Section 112 of the Clean Air Act. When EPA does consider costs, the D.C. Circuit has looked to whether there is a "clear statement" that costs can be considered. *See Ass'n of Battery Recyclers, Inc.*, 716 F.3d at 673-74; *Natural Res. Def. Council*, 529 F.3d at 1083. Here, where EPA did not consider costs, the panel majority simply deferred to EPA, considering only whether EPA had *any* reason for regulating, not whether such reason was justifiable. This gives EPA a significant amount of discretion in choosing what factors it can consider in deciding to regulate. But the discretion implied by the word "appropriate" is not unfettered; it must at a minimum include one of the most basic regulatory considerations: cost. Thus, Supreme Court review is necessary to ensure agency action is properly cabined.

1. The panel majority's decision gives EPA broad discretion to pursue its own policy, rather than that of Congress.

The panel majority found that, even if the term "appropriate" required consideration of costs in *some* instances, it was not warranted here because Section 112 references the study on public health hazards. App. 26a. But while EPA must consider the results of that public health-based study before regulating,

it also must determine whether regulation is "appropriate and necessary."

While the existence of a public health hazard is a necessary prerequisite to regulation under Section 112, determining whether regulation is "appropriate and necessary" under Section 112 includes more than a consideration of public health hazards. Under Section 112(n)(1)(A), EPA was also to report to Congress on alternative control strategies for EGU HAP emissions "which may warrant" regulation. 42 U.S.C. § 7412(n)(1)(A). Such review must include considerations of economic and technical feasibility of available controls.

Legislative history also showed that Congress was concerned with the efficacy of regulating EGUs. EPA previously acknowledged that Congress treated utilities differently, recognizing Congress "imposed special threshold conditions on any EPA regulation of power plants under section 112 that it did not apply to any other source category." Final Br. of Respondent EPA, *New Jersey v. EPA*, No. 05-1097, at 20 (D.C. Cir. June 23, 2007). EPA also previously found that Congress understood that utilities, because they are subject to numerous requirements, "should not be subject to duplicative or otherwise inefficient regulation." 70 Fed. Reg. 15,994, 15,999 (Mar. 29, 2005) (citation omitted); *see also* App. 86a-87a. As Judge Kavanaugh noted, the legislative history shows Section 112(n) was a "congressional compromise" with respect to regulation of EGU HAPs. App. 86a.

In 2012, however, EPA reversed its prior reading of the legislative history, and, while now declining to

consider costs, EPA also determined that it can regulate EGUs under Section 112 based on other factors beyond public health hazards and beyond harms directly and solely attributable to EGUs. 77 Fed. Reg. at 9325. The about face was unreasonable, and an attempt to impose the agency's apparently new policy determination, rather than following Congress's guidance. The panel majority again let EPA off the hook. App. 24a. It dismissed the legislative history, and thereby the intent of Congress, finding little relevance to Congress providing utilities with "a three-year pass." App. 27a-28a. But, if Congress intended EPA to consider only whether the study found health hazards, it would have said so.

The panel majority relied on *Whitman* and other cases that held that EPA was prohibited from considering costs unless Congress expressly instructs EPA to consider costs. In those cases, however, "congressional silence had an entirely different implication than it does here." *Sossamon v. Texas*, 131 S. Ct. 1651 (2011). The statutory provisions at issue in those cases did not grant the broad, discretionary authority to act only if "appropriate and necessary." *See Am. Textile Mfrs. Inst.*, 452 U.S. at 512-13 (finding cost-benefit analysis was not required where the statute required regulation "to the extent feasible")[3]; *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976) (addressing Clean Air

[3] While finding a cost-benefit analysis, i.e., weighing of costs against benefits, was not required, the feasibility language at issue in *American Textile Mfrs. Institute* included considerations of economic feasibility. 452 U.S. at 530 n.55.

Act provision requiring EPA to approve a state implementation plan based on set criteria outlined in statute which did not include economic feasibility); *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980) (addressing, as in *Whitman*, NAAQS, which must be "requisite to protect the public health") (quoting 42 U.S.C. § 7409(b)(1)). *Cf. Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (addressing applicability of *statutory* prohibition on particular activity not an agency's exertion of regulatory authority). Those cases involved statutory provisions that expressly limited discretion.

Here, the panel majority has interpreted Congress' "silence" on what criteria to apply to give EPA unfettered discretion to choose its own regulatory criteria. Certiorari is needed to provide clear rules to avoid such unfettered discretion.

2. This Court has recognized that consideration of costs may be required to avoid irrational results.

Finding the word "appropriate" is "open-ended," "ambiguous," and "inherently context-dependent," App. 26a (citation omitted), the panel majority simply deferred to EPA. It placed the burden on Congress to tell EPA to be reasonable. But this Court's precedent *requires* reasonable regulation, and reasonable regulation entails consideration of costs.

When a statute does not expressly state the criteria to be considered, as is the case here, EPA routinely has considered costs. For example, in *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208

(2009), this Court affirmed EPA's reliance on a cost-benefit analysis in promulgating regulations under the Clean Water Act requiring "the best technology available for minimizing adverse environmental impact." Similar to the case here, Congress did not use the word "cost" in this section, but elsewhere in the Clean Water Act expressly referenced cost-benefit analyses. The Court, nonetheless, looked at "common parlance," and found that "'best technology' may also describe the technology that *most efficiently* produces some good." *Id.* at 218 (emphasis in original). Similarly here, the word "appropriate" indicates that Congress wanted EPA to make a determination, not just whether some hazard may be identified, but whether regulation of that hazard was warranted. Such a determination inherently involves a balancing of costs and benefits.

While the majority below noted no case in which the D.C. Circuit has *required* EPA to consider costs, prior cases do illustrate that consideration of costs is warranted if "an absolute prohibition [on consideration of costs] would bring about irrational results." *Entergy Corp.*, 556 U.S. at 232-233 (Breyer concurring, in part). In *Entergy*, Justice Breyer, in concurrence, found EPA should apply the test of reasonableness "in a way that *reflects* its ideal objective," but basing agency action "solely on the result of that determination ... would put the agency in conflict with the test of reasonableness by threatening to impose massive costs far in excess of any benefit." *Id.* at 234. The test of *reasonableness*, then, may *require* the consideration of costs—particular where, as here, billions of dollars of costs will produce negligible benefits.

3. The panel majority's decision does not account for recent Supreme Court decisions addressing EPA's regulatory authority under the Clean Air Act.

Decisions of this Court that postdate the panel majority's opinion below also call into question its conclusions with respect to interpreting the meaning of the word "appropriate."

In *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), decided two months after the decision here, this Court affirmed that, "[e]ven under *Chevron's* deferential framework, agencies must operate 'within the bounds of reasonable interpretation,'" which must account for "both 'the specific context in which ... language is used' and 'the broader context of the statute as a whole.'" *Id.* at 2442 (citations omitted). This Court reviewed the agency's interpretation to determine if it was "incompatible" with "the substance of Congress' regulatory scheme." *Id.* at 2443; *see also* UARG Pet. for Writ of Cert., No. 14-47, at 25. EPA's refusal to consider costs here is incompatible with the structure and intent of Congress.

In *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014), this Court overturned another decision by the D.C. Circuit, which had held that the "Good Neighbor Provision" of the Clean Air Act did not allow for consideration of costs. This Court's holding was partly based on the practical implications of not considering costs under that provision. *Id.* at 1604-1605. The Court there found the D.C. Circuit's, and dissenters, reading of the provision at issue would be difficult to implement "in

practice" and would result in "costly overregulation unnecessary to, indeed in conflict with, the Good Neighbor Provision's goal of attainment." *Id.* Indeed, in its petition for certiorari in *EME Homer City*, EPA argued that considering costs was "also consistent with applicable guidance from this Court":

> The Court has recently stressed that, except where consideration of costs is expressly precluded by statute, the EPA and other agencies should be allowed to consider costs in construing broad qualitative standards similar to that at issue here, in order to allow the agency to identify the most efficient and least burdensome mechanisms to achieve a statutory goal.

U.S. Pet. for Cert., No. 12-1182, at 15 (S. Ct. Mar. 29, 2013) (citing *Entergy Corp., Inc.*, 556 U.S. at 218). The Court agreed with EPA that using costs in the calculus "also makes good sense," finding it created "an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address." 134 S. Ct. at 1607. The Court distinguished *Whitman* (on which the panel majority relied in this case) on the grounds that the provision at issue in *Whitman* "provides express criteria by which EPA is to set NAAQS," which by implication precluded EPA from considering cost as an additional criterion. *Id.* at 1607 n.21. It is difficult to reconcile EPA's position in *EME Homer City* and its position here.

Certiorari should be granted to bring the decision below into line with this Court's intervening opinions on similar, cost-related issues. At a

minimum, this Court should grant certiorari, vacate the judgment below, and remand for the D.C. Circuit to reconsider its decision in light of the intervening decisions.

C. The Panel Majority Improperly Dismissed Cost Concerns Based on Claimed Benefits Not Attributable to the Control of HAP Emissions of which Congress was Concerned.

The majority below dismissed Judge Kavanaugh's concerns about the high costs of the Utility MATS Rule by referencing EPA's finding of annualized benefits of $37 to $90 billion, which "outweigh its costs by between 3 to 1 or 9 to 1." App. 32a. Virtually all of the purported health benefits relate to fine particular matter (PM2.5) and, at the time, occurred at PM2.5 concentrations below the PM2.5 National Ambient Air Quality Standard—the level EPA determined to be requisite to protect public health with an adequate margin of safety.[4] The only benefits EPA estimated with respect to HAPs, which is the subject of the Section 112 provision that EPA

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[4] In 2013, EPA revised the PM2.5 National Ambient Air Quality Standard, 78 Fed. Reg. 3086 (Jan. 15, 2013), which is the vehicle Congress gave to EPA to regulate these emissions, not Section 112. The co-benefits calculated by EPA are at PM2.5 concentrations below the revised standard. *See* Prepared Statement of Anne E. Smith, Ph.D. at a Hearing on *The American Energy Initiative-A Focus on What EPA's Utility MACT Rule Will Cost U.S. Consumers*-By the Subcommittee on Energy and Power, U.S. House Energy and Commerce Committee, Feb. 8, 2012, at 19 (hereinafter "Smith Testimony"), *available at* http://www.nera.com/nera-files/PUB_Smith_Testimony_ECC_0212.pdf.

claimed authorized its rule, totaled only $4 to $6 million per year.[5] 77 Fed. Reg. at 9428. At most, then the benefits of reducing HAPs represent less than 0.01 percent of the purported benefits of the rule. *See* Smith Testimony at 6.

EPA's regulatory impact analysis was bootstrapping, pure and simple. Unfortunately, this has become a habit of EPA's. *See* Letter from Rep. Harris, MD, Chairman, Energy and Environment Subcommittee and Rep. Broun, MD, Chairman, Investigations and Oversight Subcommittee, U.S. House Committee on Science, Space, and Technology, to Administrator Sunstein, Office of Information and Regulatory Affairs, Office of Management and Budget, Nov. 15, 2011, *available at* http://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/Sunstein%20Letter.pdf. EPA routinely takes credit for reductions of PM2.5 caused by rules that address harms from other pollutants. *See id.*; *see also* Office of Management and Budget, *2013 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local and Tribal Entities*, at 15 (2013), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/2013_cost_benefit_report-updated.pdf ("Importantly, the large estimated benefits of EPA rules issued pursuant to the Clean Air Act are mostly attributable to the reduction in public

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[5] These benefits relate to mercury emissions, which EPA identified to be the hazardous air pollutant of "greatest concern" from electric generating units. 65 Fed. Reg. 79,825, 79,827 (Dec. 20, 2000).

exposure to a single air pollutant: *fine particulate matter*.") (emphasis in original). By masking (poorly) the actual costs and benefits of its rules, EPA reveals that it is bent on regulation outside the specific authority under which they are acting. This Court's oversight is needed to rein in EPA's power grab.

II. Certiorari is Warranted to Bring Regularity into the Rulemaking Process When Agencies Seek to Exercise Broad Regulatory Authority Granted by Congress.

As illustrated above, EPA inconsistently applies cost considerations when exercising its discretion. In granting such high deference to EPA, the majority's decision below allows EPA to pick and choose when to consider costs, and broaden its authority whenever it wants. Supreme Court review is warranted here to draw clearer lines regarding the exercise of an agency's discretionary authority. Otherwise an agency can continue to make virtually unfettered decisions so long as it provides some rationale for making that decision. This has resulted in regulation that imposes a significant cost on society with no real benefit, and has allowed agencies to exercise their own policy decisions, rather than those of Congress.

When Congress grants broad discretion, however, it does so on the assumption that an agency will act reasonably. Balancing of costs and benefits has long been part of the regular administrative process. Executive Order 13563, reaffirming Executive Order 12866 (1993), recognizes that "[o]ur regulatory system must protect public health, welfare, safety, and our environment while promoting economic

growth, innovation, competitiveness, and job creation." 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011). In addition, it "must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends," and "take into account benefits and costs, both quantitative and qualitative." *Id.* Under these orders, consistent with the Act, EPA must seek to lessen regulatory burdens on society.

Other regulatory and statutory requirements, if not inconsistent with the statutory authority, require consideration of regulatory options that reduce burdens. *See* 77 Fed. Reg. at 9433-9440. Here, EPA skipped application of these provisions to inform whether regulation may be "appropriate" under Section 112, as opposed to other potentially applicable provisions that would be more cost-effective. It then struggled to justify the significant costs by considering other benefits related to emissions not regulated under Section 112.

Justice Scalia warned in *EME Homer City* that "[t]oo many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people's representatives in Congress." 134 S. Ct. at 1610 (Scalia, dissenting). As such, and as Judge Kavanaugh noted in his dissent in this case below, when your "only statutory discretion is to decide whether it is 'appropriate' to go forward with the regulation ... common sense and sound government practice" warrant consideration of both costs and benefits. App. 73a-74a. Supreme Court review is necessary here to bring common sense back into the regulatory process, ensuring that Congressional

intent is implemented in a manner that is reasonable and not an extension of administrative policy rather than a legislative one.

III. The Lower Court's Failure to Check EPA's Discretion Has Significant Implications for This Country's Economy.

EPA's failure to consider costs here "is no trivial matter." App. 83a. "Put simply, the Rule is 'among the most expensive rules that EPA has ever promulgated.'" *Id.* (quoting James E. McCarthy, Congressional Research Service R42144, *EPA's Utility MACT: Will the Lights Go Out?*, at 1 (2012)).

EPA estimated the cost of the Utility MATS Rule to be $9.6 billion *annually*, while the estimated benefits are a mere $4 to $6 million (plus some unquantifiable set of purported benefits).[6] *See, e.g.*, State Cert. Pet. at 9. The $9.6 billion is probably an underestimate. It purports to represent estimated compliance costs, 77 Fed. Reg. at 9306, 9425, which industry estimates to be closer to $12 billion a year. *See* NDP Consulting, *A Critical Review of the Benefits and Costs of EPA Regulations on the U.S. Economy* (2012), at 12 (hereinafter "NAM Report"), *available at* http://www.nam.org/~/media/423A1826BF0747258F22BB9C68E31F8F.ashx. Because it is amortized over a long period, the annual cost estimate does not reflect the regulated industry's substantial upfront capital costs. *Id.* at 14-15. It was estimated that the

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[6] This estimate uses a 3 percent discount rate. Using a 7 percent discount rate, these benefits are reduced to $500,000 to $1 million. 77 Fed. Reg. at 9306.

U.S. electricity sector will have to raise about $94.5 billion of additional capital to comply with the Utility MATS rule alone (compared to EPA's $35 billion estimate).[1] *Id.* at 19-20.

While the economic costs to the utility sector are stark, the negative impact of the Utility MATS Rule will be felt throughout the economy. The high compliance costs are expected to accelerate retirements of coal-fired plants, affecting electric reliability and retail prices, and the economic burdens imposed by EPA will be spread to consumers of electricity. Higher energy prices will be compounded by higher costs for consumer goods and services.

The Energy Information Administration (EIA) conducted an analysis of the implications of accelerated power plant retirements. *See* Jeffrey Jones and Michael Leff, *Issues in Focus: Implications of accelerated power plant retirements*, Released Apr. 28, 2014 (hereinafter "EIA Report"), http://www.eia.gov/forecasts/aeo/power_plant.cfm. EIA recognized that accelerated retirements of coal-fired plants have "impacts throughout the energy system and the economy." *Id.* EIA projected that 50 Gigawatts (GW) of capacity will retire by 2020, *id.*, with 90 percent of these retirements expected to occur by 2016—the first year of enforcement for the Utility MATS Rule. EIA, *Today in Energy: AEO2014*

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[1] These estimates also do not consider incurred costs EPA attributed to compliance with other rules, including the Cross-State Air Pollution Rule, or the cumulative impact of the various rules that will impact the utility industry in the next few years. *See* NAM Report at 15-16.

projects more coal-fired power plant retirements by 2016 than have been scheduled, Feb. 14, 2014, http://www.eia.gov/todayinenergy/detail.cfm?id=15031. These retirements are not just of smaller and less frequently used plants, but included larger and more efficient plants—"the average size is 50% larger than recent retirements."[8] *Id.*

The accelerated retirements of coal-fired plants will have impacts on energy costs and electric reliability. Affordable and reliable electricity is critical to economic growth, and fuel diversity is critical to affordable and reliable electricity. Given the differences in energy use across the country, the impacts of the Utility MATS Rule will have disproportionate effects in different regions of the United States.

EPA recognized that the Utility MATS Rule "is likely to have a significant adverse effect on the supply, distribution, or use of energy." 77 Fed. Reg. at 9441. Commissioner Moeller of the Federal Energy Regulatory Commission recently expressed his ongoing concerns with the reliability implications of the Utility MATS Rule, especially in the Midwest during the summer of 2016, stating "reliability is as much a necessity for the EPA as it is for the American people."[9] Written Testimony of FERC

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[8] EPA found only 4.7 GW of coal-fired generation would likely be retired by 2015 as a result of the Utility MATS Rule, and those units to be retired are "predominantly smaller, less frequently used, and ... dispersed throughout the country." 77 Fed. Reg. at 9424.

[9] Rather than consider these issues upfront, EPA chose to use enforcement discretion so plants can operate in non-

Commissioner Philip D. Moeller Before the House Committee on Energy and Commerce Subcommittee on Energy and Power, *Hearing on FERC Perspective: Questions Concerning EPA's Proposed Clean Power Plan and other Grid Reliability Challenges*, July 29, 2014, at 9, *available at* http://www.ferc.gov/CalendarFiles/20140729091755-Moeller-07-29-2014.pdf.

In the EIA Report, *supra*, EIA also found accelerated coal retirements will increase natural gas and retail electricity prices. EPA estimated that the rule will increase the average nationwide retail electricity prices by 3.1 percent in 2015, 77 Fed. Reg. at 9425, but price impacts will have regional differences based on the locations of the plants requiring retrofitting. Other estimates show price increases to be in the range of 12-24 percent. NAM Report at 16.

Increased costs will have significant adverse impacts on jobs. EPA conducted a limit analysis of job loss and creation, finding a net increase of 8,000 jobs. 77 Fed. Reg. at 9425. However, due to the costs passed to the rest of the economy, more recent assessments show job losses in the range of 180,000-215,000 in 2015 alone and 50,000-85,000 in later years. *See* U.S. Chamber of Commerce and NERA

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compliance with the Rule to address electric reliability concerns. *See* EPA Mem., *EPA's Enforcement Response Policy for Use of Clean Air Act Section 113(a) Administrative Orders in Relation to Electric Reliability and the Mercury and Air Toxics Standard*, Dec. 16, 2011, *available at* http://epa.gov/mats/pdfs/EnforcementResponsePolicyforCAA113.pdf.

Economic Consulting, *Estimating Employment Impacts of Regulations: A Review of EPA's Methods for Its Air Rules*, Feb. 2013, at 29, *available at* http://www.nera.com/67_8015.htm.

The manufacturing sector will bear the brunt of the costs of EPA's regulation of power plants. "As consumers of more than 28 percent of electricity production, manufacturers in the United States would see production costs rise." NAM Report at 3. Manufacturing heavy states will pay disproportionately more. *Id.*; *see also id.* at 22. This will also result in increased cost of goods and services for the economy as a whole.

While energy policy is an important national issue and key to every American's qualify of life, EPA has exceeded its authority to step into the policy debates over energy sources, rather than follow the intent of Congress. Providing dependable, affordable, and environmentally sound energy requires national policy, and regulations that will impact those policies require reasoned decision-making. EPA's failure to do so here has significant implications for the entire country.

CONCLUSION

The petitions for a writ of certiorari should be granted.

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